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2. On October 7, 2002, Applicant mailed an "Amendment and Request for Reconsideration" within two months of the mailing of the Final Office Action (October 5, 2002 fell on a Saturday, so October 7, 2002 is within the two month period ). The Amendment included re-writing allowable claims in independent form.

3. On February 3, 2003, Applicant's representative, Demian Jackson, after being alerted by his docketing department called Examiner Alexander and discussed why Applicant had not received a response to the Amendment and Request for Reconsideration even though the Amendment was filed within two months of the mailing of the Final Office Action. The Examiner noted that, as Applicant's amendment could not be found in the USPTO file and Applicant had a postcard showing receipt of the Amendment by the USPTO, the USPTO must have lost the Amendment. The Examiner asked that the Amendment and postcard showing receipt of the Amendment by the USPTO be faxed to Examiner Alexander's attention for consideration. The Examiner also assured Mr. Jackson that the failure to respond to Applicant's Amendment was not Applicant's fault and that, as a result, the period for reply would be extended and Applicant would not have to pay for an RCE.

4. On the same day (February 3, 2003) Applicant faxed the Amendment and postcard to the Examiner's dedicated fax number. Copies of this postcard, Amendment, and fax receipt are enclosed herewith.

5. The six-month statutory deadline for reply to the Final Office Action of August 5, 2002 passed, at the end of February 5, 2002.

6. On February 24, 2003, the Examiner issued an Advisory Action stating that the proposed amendments would not be entered because additional claims were presented without canceling a corresponding number of finally rejected claims. This Advisory Action was received by Applicant on February 25, 2003 or 20 days after the six-month statutory deadline.

7. Prior to March 11, 2003, Mr. Jackson engaged in several calls in which Examiner Alexander indicated that he could and would extend the period for reply. In subsequent calls,

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Examiner Alexander apologized that he had determined from reviewing the M.P.E.P. that he had no authority to extend the six month period once it has passed. On March 11, 2003, the undersigned spoke with Examiner Alexander's supervisor, Jill Warden. Ms. Warden stated that, eventhough the USPTO lost Applicant's Amendment and Examiner Alexander had given prior verbal assurances that the abandonment could be corrected by the Examiner, she regretted she could not help Applicant, as the C.F.R. did not give her authority to do so.

## **II. Revival based on Unavoidable Delay under 37 C.F.R. 1.137(a)**

Applicant petitions for revival of Application No. 09/575,429 based on unavoidable delay under 37 C.F.R. 1.137(a). As outlined in the Statement of Facts above, the delay was clearly unavoidable on the part of Petitioner. Applicant actively prosecuted the application, first evidenced by Applicant filing a timely response to the Final Office Action within the two-month time period. Subsequent to the expiration of the three-month period, as the Examiner had indicated allowable subject matter and no Advisory Action was received, Applicant assumed that a Notice of Allowance was being sent. When Petitioner's docketing system alerted Petitioner to the upcoming expiration of the six-month statutory period, without a Notice of Allowance having been received, Mr. Jackson contacted Petitioner contacted Examiner Alexander and was verbally assured by the Examiner that, since the USPTO had lost the Amendment, the time period would be extended. Only then, based on the Examiner's assurances that the period would be extended since a reply to Applicant's Amendment was never mailed, did Petitioner allow the six-month period to pass. Subsequently, an Advisory Action was issued on February 24, 2003 by Examiner Alexander. As a result, Petitioner received the only response to the timely filed Amendment, 20 days after the expiration of the six-month period for reply, effectively both denying Applicant a right to an Examiner reply when an Amendment is filed within two months of a Final Office Action and, more importantly, the ability to respond to the Examiner's Advisory Action and put the application in condition for allowance. At the very least, if a timely Advisory Action had been mailed within the six-month period, Applicant would have been able to take the allowable subject matter, such as by authorizing an Examiner Amendment simply canceling non-allowed claims.

As set forth above, the delay was a result of documents lost by the USPTO and a misunderstanding by the Examiner leading to incorrect assurances by the Examiner as to the

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procedure to be followed. As these factors were not within Applicant's control, the abandonment was unavoidable. Accordingly, Petitioner respectfully requests that the application be revived under 37 C.F.R. 1.137(a). In addition, Petitioner respectfully requests that, if Applicant's petition to revive based on unavoidable delay is accepted, that the unintentional delay petition fee included herewith, be refunded to Applicant's Deposit Account No. 11-1410.

### **III. Revival based on Unintentional Delay under 37 C.F.R. 1.137(b)**

In the alternative, if revival under Applicant's petition based on unavoidable delay under 37 C.F.R. 1.137(a) is rejected, Applicant petitions to revive the abandoned application based on unintentional delay under 37 C.F.R. 1.137(b) as evidenced by the above facts.

**The entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. 1.137(b) was unintentional.**

As outlined in the Statement of Facts and with regard to revival based on unavoidable delay above, Petitioner clearly evidenced an intent not to abandon the application. In particular, Petitioner communicated this desire to the Examiner within two months of the final rejection, long prior to the expiration of the six-month statutory period, and only allowed this six-month period to pass based on the Examiner's assurances that the period would be extended, since a reply to Applicant's Amendment was not mailed until after the expiration of said period. In addition, as the Examiner had noted allowable subject matter, Petitioner would not have intentionally abandoned the application, but would have taken this allowable subject matter had Petitioner been given the opportunity.

As set forth above, the delay was a result of mistakes made by the USPTO and subsequent incorrect assurances by the Examiner to Petitioner and were, therefore, unintentional as Petitioner had clearly evidenced intent to actively prosecute the application. Accordingly, Petitioner respectfully requests that the application be revived under 37 C.F.R. 1.137(b).

### **IV. Request for Refund of Fee Required Under 37 C.F.R. 1.137(a) or 1.137(b)**

In the event that the Office of Petitions finds that Petitioner has not met the evidentiary burden imposed by the unavoidable delay standard, but has shown unintentional delay, Petitioner

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respectfully requests that the fee under 37 C.F.R. 1.137(a) or 1.137(b) enclosed herewith be refunded to Petitioner's Deposit Account No. 11-1410 based on the mitigating circumstances described herein. Specifically, the USPTO lost Applicant's Amendment, incorrectly assured Applicant that the period for reply could and would be extended, and both the Examiner and the Examiner's Supervisor expressed regret that the C.F.R. gave them no authority to help Petitioner. Accordingly, Applicant respectfully ask the Office of Petitions to refund the fee under 37 C.F.R. 1.137(a) or 1.137(b).

#### **V. Conclusion**

In light of the petition to revive set forth herein, Petitioner respectfully requests that the application be revived. Furthermore, the Amendment and Request for Continued Examination submitted concurrently with this petition for revival places the application in condition for allowance. Accordingly, Petitioner respectfully requests the same. If, however, some issue remains that the Office of Petitions feels can be addressed by telephone, the Office is cordially invited to call the undersigned to discuss the matter.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: 2 APRIL 2003

By: 

Thomas F. Smegal, Jr.  
Registration No. 20,732  
Attorney of Record  
2040 Main Street  
Fourteenth Floor  
Irvine, CA 92614  
(415) 954-4114